of solicitors for damages sustained by the estate by reason of the firm's delay for more than 6 years in notifying him of his appointment as executor.

Although the facts of the case did not involve latent defects (i.e. defects not discovered and not discoverable by reasonable diligence) in a building, a majority of the Justices in their judgments dealt with that problem.

The leading Judgment in that regard was given by Deane J., with whom Mason C.J. and Wilson J. agreed in substance. Gaudron and Brennan JJ. gave separate judgments on the point.

Deane J. proceeded on the basis that an action in tort for negligence for damages in respect of latent defect is ("in the absence of consequential collapse or physical damage") an action for economic loss sustained at the time the existence of the latent defect was detected or ought with reasonable diligence to have been detected. On that basis an owner would have a right to commence such an action at any time within six years of the date upon which such loss was sustained.

Gaudron J. proceeded on a basis that did not necessarily agree with Deane J. Gaudron J. considered that it was arguable that the relevant test for limitation purposes was the interest infringed. If the interest infringed was the value of the property, Her Honour would agree with Deane J.'s conclusion. If, however, the interest infringed was the physical integrity of the property, Her Honour acknowledged the logic of the Pirelli approach. Her Honour's judgment therefore leaves the issue open.

Brennan J.'s judgment also leaves the issue open although arguably it is capable of a construction which favours the Pirelli approach.

As Mason C.J. and Deane and Wilson JJ. constituted a majority of the High Court, the law in Australia with respect to the limitation period for an action in tort in respect of a latent defect is therefore as stated in the judgment of Deane J.

That law will apply to both the original owner and subsequent owners of the building.

It follows that in Australia although there is a limit on the period of time which can elapse without the right to sue for damages for economic loss arising from a latent defect being lost, the method of calculation of that period is such that provided an owner and his legal advisors are reasonably diligent, the owner should not lose such a right of action by reason of the provisions of a Limitation Act.

Deeds

From an owner's point of view, further protection against limitation problems may lie in the use of a deed to record the contract between the parties. The reasons are as follows. Proceedings for negligence causing physical damage must be commenced within six years of the period specified by Deane J. However, proceedings for the same wrong but in breach of a term of a deed need only be commenced in New South Wales within twelve years of the date of breach. Similar extended periods exist in other States.

The date of breach will occur upon completion of the work or the building. The twelve year (or similar) period may mean that the original owner's right to commence proceedings for breach of the deed will exist after his right to commence proceedings for negligence causing physical damage will have been lost.

The extra time could mean the difference between recovering or not recovering the cost of rectifying a defective building. The writer is aware of a case in Sydney involving a multi-million dollar claim by an owner where this arose.

Every owner should therefore insist that contracts between it and any of the following in respect of the construction or refurbishment of a building are in the form of a deed:

- Consultants (architects, engineers, project managers, etc)
- Head contractor
- Suppliers.

The deed must not, however, provide for the issue of a conclusive final certificate or similar document at the expiration of the work. Such a certificate, if issued, could well deprive the owner of the right to sue for breach of the deed.

Obstacles to a Limitations Defence

Even if a limitation defence appears to be available, an owner may still be able to escape it. For example:

- The onus of proving the right to sue has been lost rests on the defendant. If it fails, the defence will fail.
- The defendant may be "estopped" (that is prevented as a matter of law) from successfully raising the defence.
- There may be statutory provisions available which grant the Court a discretion to extend the limitation period. Such provisions exist in South Australia, the Australian Capital Territory and the Northern Territory.

- Adrian Batterby (Partner), Westgarth Baldick, Solicitors.

17. THE LESSON OF SAN SEBASTIAN

The lesson to be learned from the recent decision of the High Court of Australia in San Sebastian Pty Limited & Anors v the Minister Administering the Environmental Planning and Assessment Act 1979 & Anor (1986) 6 BCLRS 327 is any reliance placed on a public planning proposal is at one's own risk.

In that case, the State Planning Authority (NSW) ("the Authority") and the Council of the City of Sydney ("the Council") were found to have no liability to a developer ("the Developer") in respect of the preparation and publication of a redevelopment plan, subsequently abandoned after several years, for the Woolloomooloo area of Sydney.

Prior to that abandonment, the Developer on the basis of the plan had, via certain companies ("his companies"), acquired land in the area and incurred other expenditure in pursuit of a redevelopment proposal he intended to implement in accordance with that plan. At the time of abandonment of the plan, he had not obtained the development consent necessary to implement his proposal.

The abandonment of the plan accordingly caused him and his companies very substantial losses which he sought by the proceedings to recover from the Authority and the Council.

To appreciate the basis of the decision, the following factual background is relevant.

The Facts

In February, 1968 a meeting was convened between the Council and the Authority at which it was resolved to arrange for the preparation of a detailed plan of development for the Woolloomooloo area. A committee, comprising representatives of both, and a planning team were established.

In July, 1968 the Authority submitted its report on the completed plan to the Council. In August, 1969 it was adopted by the Council. One week later it was placed on public exhibition at Sydney Town Hall. The plan was exhibited as the following three documents ("the Study documents"), copies of which were made available to members of the public attending the exhibition:

- Woolloomooloo Redevelopment Study.
- Development Control Proposals.
- A publicity brochure.

The Developer visited the exhibition and obtained a copy of the Study documents. He examined them. Believing them to have

been prepared by experts in town planning, he accepted them and relied upon them. On that basis, his companies, which were the vehicles for his development proposal, acquired relevant properties in the Woolloomooloo area and incurred further expense in connection with the development of those properties.

The plan proposed high density development for Woolloomooloo with the objective of a developer or developers purchasing existing small lots and consolidating them for high density development. Maximum participation of private enterprise was contemplated and the exhibition was designed to stimulate the interest of developers.

Subject to one possible exception, the plan contained no express statement about the ultimate level of development or the continuing application by the Council of the maximum floor space ratios. The possible exception was a statement in the brochure that a workforce of 35,000 and a resident population of 9-10,000 was envisaged when the area was fully redeveloped.

It was not until July, 1971, nearly two years after adoption of the plan, that the plan acquired a statutory role other than as a guide to the public interest the Council was required to consider. In July, 1971 that role changed. The City of Sydney Planning Scheme Ordinance was proclaimed.

Pursuant to a clause of that ordinance, the Council was required to take the plan into consideration in respect of any application for consent to use or develop a site in the area. However, the Council was not bound to exercise its powers to control development in accordance with the plan.

The Council proceeded to administer development control and to exercise its powers over the granting or refusing of development applications in reliance upon the plan until its abandonment in November, 1972. Following that abandonment the properties of the Developer's companies were sold by or resumed from the companies at very substantial losses.

The Developer's Case

The Developer and his companies brought actions in negligence against the Council and the Authority claiming the amounts of their respective losses. The negligence was said to arise in three respects, namely in:

- preparation of the plan;
- publication of the plan;
- failing to warn of the possibility that the plan might be abandoned.

The argument before the Court focussed on the issue of negligent publication. The Developer and his companies argued that misrepresentations had been negligently published by the Council and the Authority. The essence of their claim was:

- the plan stated or implied that it was capable of implementation in relation to transportation;
- the plan recommended a floor space ratio of 2:1 or 3:1 subject to a general maximum permissible floor space;
- the plan represented that development to the maximum ratio would be approved;
- development in accordance with the plan would in all probability have attracted a workforce of 50- 90,000;
- the existing transportation system was however adequate for a workforce of only 10,000;
- a workforce in excess of 35,000 would be physically beyond the capacity of the existing and envisaged transport facilities of the area;
- consequently, development in accordance with the plan was in fact not feasible.

It was agreed by the parties that if the claim in respect of negligent publication failed on the ground that the alleged misrepresentation had not been made, the other two heads of claim would also fail.

The Developer and his companies were successful at the trial. They obtained judgments for very large sums against the Authority and the Council. The Authority and the Council appealed to the Court of Appeal of New South Wales. They were successful. The Developer's companies then appealed to the High Court of Australia. The five members of the Court unanimously rejected the appeal.

Thus of the nine judges before whom the case had been argued, only one, the trial judge, found in favour of the Developer and/or his companies.

The Judgment

In the High Court four of the five judges gave a joint judgment ("the Judgment"). The principal elements which may be extracted from the Judgment for present purposes are as follows:

- The development plan in question was a plan intended to serve as a guide for future development.
- As such, in the absence of indications to the contrary, the plan was merely an expression of present intention and future expectation.
- Such plans are subject to alteration, variation and revocation as part of the administrative and political process.
- In any event unless such a plan is given appropriate legislative protection, it will not affect the overriding discretion of a council to depart from the proposals incorporated in the plan when determining individual applications for development approval. Thus, for example, if a council was to find that in practice a plan was proving to be inadequate it could refuse to grant approvals to development proposals made in accordance with the provisions of the plan.
- Accordingly, in the absence of indications to the contrary, it will not readily be inferred that such a plan contains an assurance that it will be continuously and inflexibly applied in the future.
- Therefore, unless the contrary indications can be found, developers must make their own assessments as to the future development policy based, if necessary, on the advice of their consultants.

Applying those principles to the facts the judges held:

- There was nothing in the Study documents which expressly or impliedly indicated that the redevelopment plan would be permanent and unalterable.
- Further, the Study documents, with one possible exception, contained no assurance about the ultimate level of the development or the continuing application by the Council of the maximum floor space ratio. The assurance could not be found as the Study documents gave no assurance in respect of factors relevant to such matters, namely the extent of Commonwealth participation, the degree of site consolidation, the respective levels of residential and commercial use, the respective levels of office and non-office commercial use and the extent of road closures.
- As to the possible exception, it was inconsistent with the alleged implied representations as it referred to a workforce of 35,000 and not the 50-90,000 relied upon by the Developer's companies.
- The findings of the trial judge that Study documents were not prepared with the degree of professional competence reasonably to be expected of the Authority and the Council in that they did not in the course of preparing those documents undertake a detailed analysis of the

capacity of the transport system was therefore insufficient in itself to make the Authority and the Council liable to the Developer's companies for the losses suffered by them.

Brennan J.

The fifth judge of the High Court reached the same conclusions by different reasoning. The relevant elements to be extracted for present purposes from His Honour's judgment were as follows:

- The Council and the Authority were bound to exercise their powers to control development in Wooloomooloo solely in the public interest.
- The Council was free, as a public authority, to alter a development policy adopted by it unless the policy had been given binding effect by statute or contract.
- As no binding effect applied on the facts, the Council was free to alter its policy without liability to the Developer's companies. This was so even if the policy change had been brought about by the negligent preparation or publication of the original policy.
- Further, it being common knowledge that public authorities are free to alter policy, it would be unreasonable to allow the Developer's companies to rely on a representation that the policy was feasible of implementation. To find otherwise would defeat the public interest which must prevail.

Conclusion

In the absence of exceptional circumstances, a developer should proceed on the basis that until he has obtained development approval, the possibility of developing a property in accordance with a public planning proposal may be removed by a change of policy by the responsible public authority without compensation to the developer for the losses and expenses incurred by him on the basis of the previous policy.

- Adrian Batterby (Partner) and Judith Cotton (Solicitor) of Westgarth Baldick.

18. WORKERS' COMPENSATION INSURANCE - NEW SOUTH WALES

The Insurance Premiums Committee of WorkCover has recommended changes to the premium scheme. These amendments were adopted and published in Government Gazette No. 109 dated 30th June, 1988 and are applicable to all policies renewed or incepted on or after 30th June, 1988.

Premium Formula

The formula is again based on wages and claims. Renewal deposit premiums are based on wages and claims figures for the 1986/1987 and 1987/1988 periods. Adjustments at the end of the 1988/1989 period will be calculated using 3 year wages and claims figures (including year just completed).

The "F" factors (actuarial calculations to determine the likely future cost of claims, taking into account factors such as inflation and claims incurred but not reported to insurers) and the experience premium adjustment "S" factor have been changed. The "F" factors for the 1988/89 adjustment will be gazetted in due course. The adjustment of these factors will have the effect of generally increasing the premiums payable by all sized employers by up to 28% of last year's cost. These increases will apply to employers who have had a consistent wages/claims record and will also apply whether they have had a good or bad claims experience.

The formula still does not apply to Employers whose deposit/basic tariff premium is less than $2,000.

If an employer's basic tariff premium does not exceed $75,000 the experience adjusted premium shall not exceed twice that amount, i.e. an employers basic tariff premium is $60,000 and due to an adverse claims experience the adjusted premium payable amounts to $150,000, then the premium is reduced to $120,000.

The system of cross subsidisation which pools industries into twelve classifications of businesses has been continued. Some classifications have changed either up or down one classification in the basic tariff premium pools. For example, the roadmaking rate (classification No. 850) reduced from 6.6% to 5.2%.

Cost of Claims

The regulations state that the cost of claims must be reduced by the first $500 or if a claim is less than $500 that lesser amount.

The cost of claims are not to include claims under Section 10 of the Act (Journey claims).

Large Claim Limits

Claim figures are adjusted for the purpose of the formula with the large claim limit specified applying to an injury which was received or deemed to have been received during the year from 30th June, as follows:-

30th June, 1986/1987 - $200,000
30th June, 1987/1988 - $100,000
30th June, 1988/1989 - $100,000

Dust Diseases Levy

This levy has been suspended for the 30th June, 1988/89 period.

- Lowndes Lambert Australia Insurances Ltd.

19. NEW SAA SUPPLY CONTRACTS

The Standards Association of Australia has just published a new supply contract General Conditions Of Contract For The Supply Of Equipment AS3556-1988. This is a simple supply contract which does not contain the site works provisions contained in AS2987-1987, General Conditions of Contract For The Supply Of Equipment With Or Without Installation.

AS2987-1987 and AS3556-1988 are available from the Standards Association for $17-20 each, plus $2-50 for postage and handling. The features of both AS2987-1987 and AS3556-1988 will be covered in detail in a forthcoming issue of Australian Construction Law Newsletter.

20. LAND - RIGHT OF SUPPORT FOR FUTURE BUILDINGS

In Kebewar v Harkin (1987) 7 BCLRS 219, the New South Wales Court of Appeal considered the issue of owners' right to support of their land. This issue arises quite frequently with respect to excavation and thus is important.

In this case, a contractor carried out excavation near a common boundary with land owned by Kebewar. The contractor erected a retaining wall at the boundary, but the wall was inadequate to withstand the pressure from the erection of an ordinary house. The land was vacant at the time that excavation was carried out.

The Supreme Court of New South Wales made a declaration that Kebewar had no right to the support of buildings which may be erected on its land. Kebewar appealed.

The questions in the appeal included whether the excavation contractor had an obligation to provide support for Kebewar's land in order that a residence could be erected on it, whether the contractor was guilty of negligence in the excavation and whether the excavation had been carried out in breach of relevant Ordinances.

The Court of Appeal held that:

1. In the absence of agreement or prescription, an owner of land on which a building is erected has no right of support for that building from the land of an adjoining occupier; Dalton v Angus (1881) 6 AC 740. The owner's right of support is limited to